**ALI TAN & ORS**

**v.**

**MAZLAN BIDIN & ANOR**

COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF PCA
HISHAMUDIN MOHD YUNUS JCA
AZAHAR MOHAMED JCA
[CIVIL APPEAL NO: B-04-222-2011]
12 JUNE 2012

***CIVIL LAW ACT:*** *Damages - Fatal accident - Dependency claim - Loss of support - Third and fourth appellants suing as lawful parents and dependants of deceased - Appellants and deceased were "Orang Asli" - No documentary evidence adduced to prove deceased lawfully adopted by appellants - Whether appellants were parents of deceased - Factors to consider - Whether unjust to deny appellants' claim - Whether claim to be allowed - Civil Law Act 1956, s. 7(11) - Joremi Kimin & Anor v. Tan Sai Hong*

***DAMAGES:*** *Fatal accident - Dependency claim - Loss of support - Assessment of - Sessions Court awarded multiplicand of RM500 and multiplier of 12 years - Evidence of deceased's earnings - Appeal to High Court - Whether High Court erred in reducing multiplicand from RM500 to RM100 per month - Whether High Court erred in increasing multiplier from 12 to 16 years - Civil Law Act 1956, s. 7(3)(iv)(d) - Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor and Another Appeal*

***DAMAGES:*** *Fatal accident - Dependency claim - Loss of support - Third and fourth appellants suing as lawful parents and dependants of deceased - Appellants and deceased were "Orang Asli" - No documentary evidence adduced to prove deceased lawfully adopted by appellants - Whether appellants were parents of deceased - Whether unjust to deny appellants' claim - Whether claim to be allowed - Civil Law Act 1956, s. 7(11) - Joremi Kimin & Anor v. Tan Sai Hong*

This appeal arose in relation to a motor vehicle accident between a motorcycle ridden by one Yakin Ali, deceased ('D1') along with his pillion rider, one Hok Ancis, deceased ('D2'), and the second respondent's lorry which was driven by the first respondent. As a

result of the said accident, D1 and D2 died. The Sessions Court found that the respondents ('defendants') were liable for negligence whereas the appellants ('plaintiffs'), who were suing as the lawful parents and dependants of D1 and D2 respectively, were liable for contributory negligence to the extent of 50%. The first and second plaintiffs were awarded with damages in the sum of RM36,000 for loss of support, based on: (i) the multiplicand of RM500 per month (ii) the multiplier of 12 years and (iii) the 'one-third deduction' rule for living expenses. However, the court dismissed the third and fourth plaintiffs' claim since they had failed to produce any document to support the fact that D2 was their lawfully adopted son. On appeal by the defendants, the High Court reduced the multiplicand to RM100 per month for the first and second plaintiffs but increased the multiplier from 12 years to 16 years. However, the High Court agreed with the reasoning of the Sessions Court and dismissed the third and fourth plaintiffs' appeal in relation to their claim. Hence this appeal by the plaintiffs. It was the third and fourth plaintiffs' contention that they never registered D2's adoption as they were "Orang Asli".

**Held (allowing appeal with costs)**
**Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:**

**(1)** In relation to the claim by the first and second plaintiffs, the High Court erred in reducing the multiplicand to RM100 per month since there was evidence from D1's employer that he was earning RM750 per month. There was also evidence from the first plaintiff that D1 gave his parents RM500 - RM600 per month. Hence, the multiplicand of RM500 per month was restored as previously determined by the Sessions Court. Further, the multiplier of 16 years was confirmed as it complied with s. 7(3)(iv)(d) of the Civil Law Act 1956 ('the Act') (*Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor and Another Appeal*; refd). (paras 26 & 27)

**(2)** The Sessions Court and High Court erred in dismissing the third and fourth plaintiffs' claim. There was evidence that ever since D2's father died, the said plaintiffs had adopted him as their child. Section 7(11) of the Act was not meant to deny the claim of a parent in respect of his/her deceased *de facto*

adopted child such as in the present case. It would be unrealistic, harsh and unjust to deny the claim in respect of their adopted child, D2. (paras 29, 30 & 31)

**(3)** The courts below should have taken judicial notice of the fact that various "Orang Asli" communities of this country live in the outer fringes of the main stream society, and some still live in the remote jungle. The vast majority are still socially backward and is often the case that they do not have birth certificates, identity cards, etc, let alone to expect them to have adoption orders issued under s. 3 of the Adoption Act 1952. (para 31)

**(4)** If strict compliance with the law pertaining to marriage was never insisted upon by the courts in respect of persons claiming to be 'wife' of the deceased persons in claims under s. 7 of the Act, there was no reason why similar flexibility could not be accorded to cases of *de facto* adoption, particularly where it involves the "Orang Asli" (*Joremi Kimin & Anor v. Tan Sai Hong*; refd). Hence, for the purpose of s. 7 of the Act, the *de facto* adopted parents of D2 were his parents. (para 33)

*[The sum of RM31,680 was awarded to the third and fourth plaintiffs in respect of their claim over the death of D2.]*

***Bahasa Malaysia*** *Translation Of Headnotes*

Rayuan ini berbangkit daripada satu kemalangan kenderaan di antara motosikal yang dipandu oleh Yakin Ali, simati ('D1') bersama-sama dengan pemboncengnya, Hok Ancis, simati ('D2'), dan lori kepunyaan responden kedua yang dipandu oleh responden pertama. Akibat kemalangan tersebut, D1 dan D2 telah meninggal dunia. Mahkamah Sesyen mendapati bahawa responden-responden ('defendan-defendan') cuai manakala perayu-perayu ('plaintif-plaintif'), yang mengambil tindakan masing-masing sebagai ibu bapa sah dan tanggungan D1 dan D2, sumbang cuai pada tahap 50%. Plaintif pertama dan kedua telah diaward dengan gantirugi sebanyak RM36,000 bagi kehilangan saraan, berdasarkan: (i) multiplicand sebanyak RM500 sebulan (ii) pendarab bagi 12 tahun dan (iii) kaedah 'potongan satu-per tiga' bagi perbelanjaan hidup. Walaubagaimanapun, mahkamah telah menolak tuntutan plaintif

ketiga dan keempat atas kegagalan mereka untuk mengeluarkan sebarang dokumen bagi menyokong fakta bahawa D2 telah diambil secara sah sebagai anak angkat mereka. Atas rayuan oleh defendan-defendan, Mahkamah Tinggi telah mengurangkan multiplicand kepada RM100 sebulan bagi plaintif pertama dan kedua tetapi menaikkan pendarab dari 12 tahun kepada 16 tahun. Bagaimanapun, Mahkamah Tinggi bersetuju dengan pendapat Mahkamah Sesyen dan menolak rayuan plaintif ketiga dan keempat berdasarkan tuntutan mereka. Oleh itu rayuan ini oleh plaintif-plaintif. Adalah hujahan plaintif ketiga dan keempat bahawa mereka tidak mendaftar pengangkatan D2 kerana mereka merupakan Orang Asli.

**Diputuskan (membenarkan rayuan dengan kos)**
**Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:**

**(1)** Berkenaan tuntutan plaintif pertama dan kedua, Mahkamah Tinggi telah khilaf dalam mengurangkan multiplicand kepada RM100 sebulan memandangkan terdapat keterangan daripada majikan D1 bahawa pendapatan beliau adalah sebanyak RM750 sebulan. Juga terdapat keterangan daripada plaintif pertama bahawa D1 telah memberi ibu bapanya sebanyak RM500-RM600 sebulan. Oleh itu, multiplicand sebanyak RM500 sebulan dikekalkan seperti yang diputuskan oleh Mahkamah Sesyen. Tambahan, pendarab 16 tahun disahkan memandangkan ianya mematuhi kehendak s. 7(3)(iv)(d) Undang-Undang Sivil 1956 ('Akta') (*Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor and Another Appeal*; dirujuk).

**(2)** Mahkamah Sesyen dan Mahkamah Tinggi khilaf dalam menolak tuntutan plaintif ketiga dan keempat. Terdapat bukti bahawa sejak kematian bapa D2, plaintif-plaintif tersebut telah mengambil beliau sebagai anak mereka sendiri. Seksyen 7(11) Akta tidak bertujuan untuk menafikan tuntutan ibu bapa berkenaan anak angkat *de facto* mereka yang telah meninggal dunia seperti di dalam kes ini. Ianya akan menjadi tidak realistik, keras dan tidak adil untuk menafikan tuntutan berkenaan anak angkat mereka, D2.

**(3)** Mahkamah-mahkamah bawahan sepatutnya mengambil pengiktirafan kehakiman berkenaan fakta bahawa kebanyakan komuniti Orang Asli di negara ini tinggal di kawasan pinggir masyarakat utama, dan masih ada beberapa yang tinggal di kawasan hutan terpencil. Majoriti besar masih kebelakangan dari segi sosial dan kerap berlaku di mana mereka tidak mempunyai sijil kelahiran, kad pengenalan, dan lain-lain, apatah lagi untuk mempunyai perintah pengangkatan di bawah s. 3 Akta Pengangkatan 1952.

**(4)** Jika pematuhan ketat undang-undang berkenaan perkahwinan tidak didesak oleh mahkamah berkaitan dengan seseorang yang menuntut dirinya sebagai 'isteri' si mati dalam tuntutan di bawah s. 7 Akta, maka tiada sebarang sebab kenapa fleksibiliti yang sama tidak boleh diberi kepada kes-kes pengangkatan *de facto*, terutamanya yang membabitkan Orang Asli (*Joremi Kimin & Anor v. Tan Sai Hong*; dirujuk). Oleh itu, bagi kehendak s. 7 Akta, ibu bapa angkat *de facto* D2 adalah ibu bapanya.

*[Jumlah RM31,680 diawardkan kepada plaintif ketiga dan keempat berkenaan tuntutan mereka terhadap kematian D2.]*

**Case(s) referred to:**

*Chan Chin Min & Anor v. Lim Yok Eng (Lawful Mother of Gan Swee Hock, Deceased) [1994] 3 CLJ 687 SC* ***(refd)***

*Chong Sin Sen v. Janaki Chellamuthu [1997] 2 CLJ 699 HC* ***(refd)***

*Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor and Another Appeal [2004] 1 CLJ 797 CA* ***(foll)***

*Joremi Kimin & Anor v. Tan Sai Hong [2001] 1 CLJ 526 CA* ***(refd)***

*Rohani Tengkah v. Zainal Lani & Anor [2004] 2 CLJ 108 HC* ***(refd)***

*Zulkifli Ayob v. Velasini K Madhavan & Anor [2000] 1 CLJ 117 HC* ***(refd)***

**Legislation referred to:**

Adoption Act 1952, s. 3

Civil Law Act 1956, s. 7(11)

*For the appellants - Harjeet Singh Sidhu; M/s PS Sohanpal & Sidhu*

*For the respondents - V Savinthri Devi; M/s Kanaga, Suresh & Co*

*[Appeal from High Court, Shah Alam; Civil Appeal Nos: 12-227-2005 & 12-266-2005]*

*Reported by Kumitha Abd Majid*

A

## JUDGMENT

**Hishamudin Mohd Yunus JCA:**

**[1]** This is an appeal against the decision of the learned Judicial Commissioner of the High Court of Shah Alam delivered on 22 November 2010.

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**[2]** This appeal arises from a motor-vehicle accident case involving a motorcycle bearing registration number DL 2598 (driven by one Yakin bin Ali, now deceased; with one Hok bin Ancis, now deceased, as the pillion rider) and a lorry bearing registration number JCB 3002 (driven by the first respondent, Mazlan bin Bidin; and owned by the second respondent, Shamsiah binti Abd Mansor, the registered owner).

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**[3]** The collision between the two vehicles occurred on 17 November 1996 at the 16-kilometer point along the Banting-Dengkil stretch of road. As a result of the accident, both the riders of the motorcycle, Yakin, and its pillion rider, Hok, died.

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**[4]** At the time of the tragic accident, the deceased Yakin bin Ali was 21 years of age; whilst the deceased Hok bin Ancis was 24.

**[5]** On 6 April 2005 the Sessions Court at Klang found the respondents liable in negligence on the following basis: the respondents conceding liability for negligence; and the appellants conceding to liability for contributory negligence to the extent of 50%.

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**[6]** The trial before the Sessions Court, therefore, was only on the quantum of damages.

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**[7]** The first, second, third and fourth appellants in this appeal are the first, second, third and fourth plaintiffs, respectively, before the Sessions Court. Therefore, in this appeal, the appellants shall be referred to as the "first plaintiff", "second plaintiff", "third plaintiff" and "fourth plaintiff", as the case may be.

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**[8]** The first and second respondents in this appeal are the first and second defendants at the Sessions Court. Hence, in this appeal, the respondents shall be referred to as the "defendants".

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**[9]** The Sessions Court, after the trial on the issue of quantum of damages, awarded damages to the first and second plaintiffs as the parents and dependants of the deceased Yakin bin Ali.

**[10]** The Sessions Court awarded damages in the sum of RM36,000 for loss of support (after having reduced the full award sum of RM72,000 by 50% for contributory negligence); based on the multiplicand of RM500 per month and the multiplier of 12 years; and applying the 'one-third deduction' rule for living expenses based on *Rohani Tengkah v. Zainal Lani & Anor* [2004] 2 CLJ 108.

**[11]** The multiplicand of RM500 is arrived at after the learned Sessions Court Judge made a finding of fact that the income of the late Yakin, as a bulldozer driver, was RM750 per month, and that he gave about RM500 to RM600 per month to his parents.

**[12]** The Sessions Court, however, dismissed the claim of the third and fourth plaintiffs, who claimed as the lawfully adopted parents and dependants of the deceased pillion rider, Hok bin Ancis. The reason for the dismissal of the third and fourth plaintiffs' claim is that the deceased Hok bin Ancis was not their lawfully adopted son. According to the learned Sessions Court Judge, the third and fourth plaintiffs had failed to produce any document to support their claim that Hok bin Ancis was their lawfully adopted son.

**[13]** The third and fourth plaintiffs were dissatisfied with the decision of the learned Sessions Court Judge. They, therefore, appealed to the High Court.

**[14]** The third and fourth plaintiffs, in appealing to the High Court, were aggrieved by the decision of the learned Sessions Court Judge dismissing their claim and ruling that Hok bin Ancis was not their lawfully adopted son.

**[15]** Apart from the third and fourth plaintiffs, the defendants too were dissatisfied with the decision of the Sessions Court on the quantum awarded in respect of the claim of the first and second plaintiffs. They contended that there was insufficient evidence to support the claim that the deceased Yakin bin Ali was ever employed when he was alive; and, alternatively, even if the

A deceased Yakin bin Ali was employed, the multiplicand of RM500 per month was too high. Therefore, the defendants also appealed to the High Court against the decision of the Sessions Court.

**[16]** Before the High Court the two appeals were consolidated
B and heard together.

**[17]** The High Court allowed the appeal of the defendants on the multiplicand. The High Court reduced the multiplicand to a mere RM50 per month for each of the two plaintiffs (that is, the first and second plaintiffs). In other words, the High Court reduced
C the multiplicand from RM500 per month to RM100 per month for the claim of the parents/dependants of the deceased Yakin bin Ali. The learned Judicial Commissioner, however, in her brief grounds of judgment did not give any reason for drastically reducing the multiplicand from RM500 per month to a mere RM100 per
D month.

**[18]** It is significant to note, however, that although the learned Judicial Commissioner reduced the multiplicand from RM500 per month to RM100 per month, however, she increased the multiplier
E from 12 years to 16 years. Likewise, here, the learned Judicial Commissioner also did not provide any reason for varying the multiplier from 12 years to 16 years.

**[19]** The learned Judicial Commissioner, however, dismissed the
F appeal of the third and fourth plaintiffs. The learned Judicial Commissioner agreed with the reasoning of the learned Sessions Court Judge that there was no documentary evidence to substantiate the claim of the third and fourth plaintiffs, that the deceased Hok bin Ancis was their lawfully adopted son.

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**[20]** All the four plaintiffs are appealing to this court against the decision of the High Court.

**[21]** The defendants, however, are not appealing to this court. In other words, the defendants accept the multiplier of 16 years in
H regard to the dependency claim of the parents of the deceased Yakin bin Ali.

**[22]** On 1 March 2012, having heard submissions, we reserved judgment.

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**[23]** We now give our decision. A

**[24]** Our decision is unanimous.

**[25]** We are allowing the appeal of the plaintiffs with costs.

**[26]** In respect of the claim of the first and second plaintiffs, we B hold that the learned Judicial Commissioner, with respect, erred in reducing the multiplicand from RM500 per month to RM100 per month, as there is the evidence of the employer (PW2) of the deceased Yakin bin Ali that the deceased was earning RM750 per month as a bulldozer driver, and the evidence of the first plaintiff C (Ali bin Tan, the father of the deceased Yakin) that the deceased gave his parents RM500-RM600 per month. We, therefore, bearing in mind the one-third deduction principle as applied in *Rohani a/p Tengkah* for the living expenses of the deceased, restore the multiplicand of RM500 per month as previously determined by D the learned Sessions Court Judge.

**[27]** However, for the avoidance of any doubt, we hereby confirm the multiplier of 16 years as fixed by the High Court. We are of the view that the learned Judicial Commissioner did the E correct thing in increasing the multiplier from 12 years to 16 years as this is in compliance with the clear provision of s. 7(3)(iv)(d) of the Civil Law Act 1956. We agree with the Court of Appeal in *Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor and Another Appeal* [2004] 1 CLJ 797 that the majority judgment in *Chan Chin* F *Min & Anor v. Lim Yok Eng (Lawful Mother of Gan Swee Hock, Deceased)* [1994] 3 CLJ 687 was *per incurium* and that the dissenting judgment of Edgar Joseph Jr. SCJ regarding the multiplier was correct.

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**[28]** Therefore, the full award sum in respect of the claim of the first and second plaintiffs should be RM96,000 (RM500 x 12 months x 16 years). But this sum of RM96,000 would have to be reduced by 50%, being the agreed percentage reduction for contributory negligence on the part of the deceased. We, H therefore, make an award of RM48,000 (ie, 50% of RM96,000) to the first and second plaintiffs in respect of their dependency claim over the death of their son, Yakin bin Ali.

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**[29]** Now, we move on to the appeal of the third and fourth plaintiffs. In our judgment, with respect, both the learned Sessions Court Judge and the learned Judicial Commissioner erred in dismissing the claim of the third and fourth plaintiffs in respect of the deceased Hok bin Ancis. We note that there is evidence that the deceased Hok bin Ancis was the nephew of the fourth plaintiff (Nguyah a/p Mahadi), and ever since Hok's father died, when Hok was just a year old, the third and fourth plaintiffs had adopted him as their child. They explained that they never registered the adoption, as they are Orang Asli.

**[30]** With respect, we are unable to accept the contention of the defendants that the third and fourth plaintiffs' claim that Hok was their adopted son must be dismissed on the grounds that they are unable to substantiate their claim of adoption with documentary evidence, citing *Zulkifli Ayob v. Velasini K Madhavan & Anor* [2000] 1 CLJ 117. We are, however, aware of the proviso to subsection (11) of s. 7 of the Civil Law Act 1956 that states:

> Provided that in deducing any relationship referred to in this subsection any illegitimate person or any person who has been adopted, or whose adoption has been registered, in accordance with any written law shall be treated as being treated as being or as having been the legitimate offspring of his mother and reputed father or, as the case may be, of his adopters.

**[31]** However, we do not think that the above proviso is meant to deny the claim of a parent in respect of his/her deceased *de facto* adopted child such as in the present case. In our considered judgment it would be unrealistic, harsh and unjust to deny the claim of the third and fourth plaintiffs in respect of their adopted child Hok. Apart from the fact that there is evidence of a *de facto* adoption of Hok by the couple ever since he was one year old, when his father died, a fact that is not seriously challenged, it has to be appreciated that the third and fourth plaintiffs and their adopted son, Hok, are Orang Asli. Therefore, the courts below should have taken judicial notice of the fact that the various Orang Asli communities of this country live in the outer fringes of the main stream of society, and some still live in the remote jungle. The vast majority are still socially backward, and as is often the case, they do not have birth certificates, marriage certificates, identity cards etc. – let alone to expect them to have adoption

orders issued under s. 3 of the Adoption Act 1952 (there is no evidence that the third and fourth plaintiffs and the deceased Hok are Muslims). A

**[32]** Moreover, there have been in the past judicial precedents of flexibility in the interpretation of s. 7 of the Civil Law Act 1956 pertaining to the meaning of 'wife'. First, there is the case of *Joremi Kimin & Anor v. Tan Sai Hong* [2001] 1 CLJ 526. In this case cited, the Court of Appeal had allowed the dependency claim of a 'wife' in respect of the death of her 'husband' under s. 7 of the Civil Law Act 1956 although the alleged marriage was never registered under the Law Reform (Marriage and Divorce) Act 1976. The claimant claimed that she was the 'wife' of the deceased because they had contracted a customary marriage in Singapore but the marriage was never registered in Singapore. The Court of Appeal, nonetheless, ruled that the claimant was a 'wife' for the purpose of s. 7 of the Civil Law Act 1956. The other case is *Chong Sin Sen v. Janaki* [1997] 2 CLJ 699. B C D

**[33]** If strict compliance with the law pertaining to marriages is never insisted upon by the courts in respect of persons claiming to be the 'wife' of the deceased persons in claims under s. 7 of the Civil Law Act 1956, we see no reason why similar flexibility cannot be accorded to cases of *de facto* adoption, particularly, where it involves the Orang Asli. We therefore rule that the *de facto* adopted parents of the deceased Hok bin Ancis are parents of the said deceased for the purpose of s. 7 of the Civil Law Act 1956. E F

**[34]** Having disposed off that issue, we now come to the actual issue of quantum. The fourth plaintiff, Nguyah (PW4), gave evidence that Hok whilst alive was self-employed earning about RM500 to RM700 doing various types of work such as collecting petai, fishing and odd jobs in the villages. According to PW4, Hok gave his adopted parents about RM400 per month as his contribution to the household expenses. G H

**[35]** Now, based on the earnings of RM500 per month, and deducting one-third from that sum for the living expenses of the deceased Hok, we arrive at a multiplicand of RM330 per month. And applying the multiplier of 16 years, we arrive at the sum of RM63,360 (RM330 x 12 months x 16 years). This sum of I

A RM63,360 must be reduced by 50% to take into account the agreed reduction of 50% for contributory negligence. Having done that, we would then arrive at the sum of RM31,680. We, therefore, make an award of RM31,680 to the third and fourth plaintiffs in respect of their claims over the death of their adopted
B son, Hok bin Ancis.

[Appeal allowed with costs]

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